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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 12, 1991

QUESTIONS PRESENTED

Congress's core/non-core distinction in 28 U.S.C. § 157 and the lack of clarity as to the bankruptcy court's authority to conduct jury trials have led to confusion among the courts over the proper scope of the bankruptcy court's jurisdiction. This case presents two questions integrally related to significant constitutional rights threatened by the Second Circuit's decision below.

I. Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 even though the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims.

II. Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court.

LIST OF PARTIES AND RULE 29.1 LIST[1]

Petitioner the Insurance Company of the State of Pennsylvania is a subsidiary of American International Group, Inc., an insurance holding company which is parent to numerous domestic property/casualty insurance companies.

Petitioner Kerwick & Curran, Inc. has no parents, subsidiaries or affiliates.

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[1] Kalvin-Miller International, Inc. is a party to the proceedings below and has not joined in this petition.

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THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, the Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc., respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit, originally entered in the above-entitled proceeding on February 7, 1990, and reinstated by the opinion and

judgment of the Second Circuit dated January 22, 1991.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Second Circuit, dated January 22, 1991, reinstating its opinion and judgment dated February 7, 1990, appears in the Appendix at A-1.[2]

The judgment of the Supreme Court vacating the Court of Appeals' opinion and judgment is reported at 111 S. Ct. 425 (1990). It appears in the Appendix at A-10.

The opinion and judgment of the Court of Appeals for the Second Circuit, dated February 7, 1990, is reported at 826 F.2d 1394 (2d Cir. 1990). It appears in the Appendix at A-12.

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[2] References to "A- " followed by a page number indicate reference to the Appendix attached hereto.

The oral opinion and order of the United States District Court for the Southern District of New York has not been reported. It is reprinted in the Appendix at A-34.

The oral opinion and order of the United States Bankruptcy Court for the Southern District of New York determining that this adversary proceeding is core has not been reported. The pages of the transcript of the hearing in which the ruling appears are reprinted in the Appendix at A-48.

The oral ruling of the United States District Court for the Southern District of New York on May 31, 1989 directing the Bankruptcy Court to determine whether this adversary proceeding is core has not been reported and is not included in the Appendix.

JURISDICTION

Petitioners seek review of the opinion and judgment of the Court of Appeals for the Second Circuit, dated February 7, 1990, which was vacated by order of the Court on November 13, 1990, and, on remand, reinstated by the opinion and order of the court of appeals, dated January 22, 1991. (A-1, A-12.)

The jurisdiction of this Court to review the order of the Second Circuit is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this petition for a writ of certiorari are:

U.S. Const. art. I, § 8, cl. 4.

> Congress shall have the Power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Const. art. III, § 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. amend. VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

The statutes involved in this petition for certiorari are 28 U.S.C. § 157, 28 U.S.C. § 158, and 28 U.S.C. § 1411, and are reprinted in the Appendix at A-52, A-57, and A-60, respectively.

STATEMENT OF THE CASE

Ben Cooper, Inc. ("Cooper"), a costume import/manufacturing business, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in April, 1988. Thereafter, Cooper employed the services of two brokers, co-petitioner Kerwick & Curran, Inc. ("KC") and Kalvin-Miller International, Inc. ("K-M"), to procure various insurance policies. As a result of the brokers' efforts, The Insurance Company of the State of Pennsylvania ("ICSP") issued property and general liability insurance coverage (the "Policy") to Cooper, as debtor-in-possession, in October, 1988. On January 6, 1989 there was a small fire at Cooper's Georgia warehouse (the "Loss"). The claim submitted by Cooper to ICSP concerning the Loss led to the dispute underlying this matter.

In April, 1989 ICSP commenced an action in the state court seeking, *inter alia*, to void the Policy on the ground that its issuance had been induced by material misrepresentation. ICSP's pleading also sought a declaration that there was no liability under the Policy because of Cooper's misrepresentations and fraudulent exaggerations relating to the Loss. Simultaneously with instituting its state court action, ICSP sent Cooper a notice of cancellation of the Policy based upon the same misrepresentations.

On May 9, 1989 Cooper commenced an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York (the "Adversary Proceeding") seeking various forms of relief against ICSP, KC and K-M. In its complaint, Cooper alleged that ICSP was

liable under the Policy for the Loss. Alternatively, Cooper alleged that if the court found the Policy to be void *ab initio*, its brokers, KC and K-M, would be liable to it for failing to place the insurance properly. Cooper also moved in the bankruptcy court to enjoin prosecution of ICSP's state court action, contending that the controversy was a core matter which should be adjudicated in the bankruptcy court. Additionally, Cooper sought to stay ICSP's attempted cancellation of the Policy.

In its answer to Cooper's complaint, ICSP raised affirmative defenses based on material misrepresentations in the Policy's procurement and fraudulent exaggeration of the claim for the Loss, the same matters which ICSP had alleged in its state court action. ICSP demanded

a jury trial, as did KC and K-M in their answers.

The Honorable Cornelius Blackshear, U.S.B.J., granted Cooper the initial relief it had sought by motion. In a hearing held on May 17, 1989, Judge Blackshear ruled from the bench: He (1) enjoined the state court action; (2) stayed cancellation of the Policy; and (3) ordered expedited discovery.

Following the bankruptcy court's ruling, ICSP, joined by KC and K-M, moved in the district court for withdrawal of the reference of the Adversary Proceeding to the bankruptcy court. In a hearing on May 31, 1989, the Honorable John M. Walker, U.S.D.J., declined to hear ICSP's request for relief until the bankruptcy court made a specific determination of whether or not the matter was core. At Judge Walker's direction, oral argument

was heard on June 15, 1989 before Judge Blackshear who ruled from the bench that the Adversary Proceeding was core pursuant to 28 U.S.C. §§ 157(b)(2)(A) (estate administration) and (L) (confirmation of plans). (A-48.) At that time Judge Blackshear expressed skepticism as to whether ICSP and its co-defendants were entitled to a jury trial. He concluded, however, that since he had found the Adversary Proceeding to be core, the matter would remain within the bankruptcy court for plenary adjudication and fact-finding.

Following Judge Blackshear's ruling that the matter was core, ICSP, KC, and K-M moved in the United States District Court for the Southern District of New York for relief from the bankruptcy court's order. In an oral ruling on July 11, 1989 the Honorable Louis L.

Stanton, U.S.D.J., reversed Judge Blackshear's ruling, withdrew the reference to the bankruptcy court, abstained from exercising jurisdiction in the district court, and lifted the injunction of the state court proceeding. (A-34.) Judge Stanton also lifted the stay which had enjoined ICSP from canceling the Policy. The court found that the controversy, which concerned only state law issues as to an insurance company's liability for a loss sustained by the debtor-in-possession, was not rendered core merely because its resolution might bring funds into or otherwise affect administration of the estate. The court's withdrawal of the reference was based in part on the further finding that ICSP and its co-defendants were entitled to a jury trial. Judge Stanton concluded that the

requirement of *de novo* review in the district court would be incompatible with the conduct of a jury trial in the bankruptcy court.

Cooper appealed the district court's ruling to the United States Court of Appeals for the Second Circuit. The court of appeals reversed the district court and remanded the proceeding to the bankruptcy court. (A-12.) The court held that the proceeding was core because the underlying contract, the Policy, had been entered into after Cooper filed its bankruptcy petition. The Second Circuit found that resolution of the dispute would necessarily affect administration of the bankruptcy estate. The court further held that the defendants were entitled to a jury trial, and that the jury trial could take place in the bankruptcy court.

By petition dated May 8, 1990, petitioners sought a writ of certiorari to review the opinion and judgment of the court of appeals; the petition presented two issues: 1) Whether a dispute concerning a post-petition contract is a core matter under 28 U.S.C. § 157, even though such dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims; and 2) whether a jury trial of the case in the bankruptcy court would comport with article III and the seventh amendment of the Constitution, the same issues presented in this petition. Certiorari was granted on June 28, 1990.

Subsequent to the grant of certiorari, the United States intervened in this matter and submitted an answering brief. The intervenor raised an issue concerning the Second Circuit's

jurisdiction to have considered the appeal from the district court. By order dated November 13, 1990 this Court remanded the matter to the Second Circuit, vacating the previous judgment entered there and directing the court of appeals to address in the first instance the jurisdictional issue raised in the Supreme Court proceedings. By order dated January 22, 1991, the Court of Appeals for the Second Circuit held that it did have jurisdiction and reinstated its previous opinion and judgment. Review is now sought of the original judgment in respect of which certiorari was granted on June 28, 1990.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S FINDING THAT A POST-PETITION CONTRACT IS NECESSARILY CORE IGNORES THIS COURT'S PRONOUNCEMENT IN *MARATHON* AND UNDERSCORES THE SUBSTANTIAL UNCERTAINTY THAT HAS RESULTED FROM CONGRESS'S FAILURE TO DEFINE "NON-CORE" UNDER THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

The Court of Appeals for the Second Circuit agreed with the conclusion of the United States Bankruptcy Court for the Southern District of New York that an ordinary state law contract dispute between an insurance company and its insured in reorganization under Chapter 11 of the United States Bankruptcy Code is a core matter pursuant to 28 U.S.C. § 157(b)(2). The Second Circuit concluded that a contract dispute involving insurance of estate assets is core as contemplated by 28 U.S.C.

§ 157(b)(2). The finding turns solely on the fact that the insurance contract in question was entered into after the debtor had filed its Chapter 11 petition. In so holding, the court below adopted the views of the First Circuit and expressly rejected those of the Fifth and Ninth Circuits.

The Second Circuit discarded Judge Stanton's reasoning by distinguishing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) on the ground that the controversy in *Marathon* arose from a pre-petition contract and claim. The court below did not present any rationale based on *Marathon* that would justify the application of the purported distinction, that is, whether the underlying contract is entered into pre-petition or post-petition.

There can be little dispute as to the critical significance of the difference between core and non-core proceedings. Pursuant to Congress's Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "BAFJA"), the statutory scheme that attempts to delineate the scope of the bankruptcy court's power to hear and resolve disputes, bankruptcy judges have plenary powers of adjudication over core proceedings. 28 U.S.C. §§ 157(b), 158(a). With respect to non-core matters, however, a bankruptcy judge's findings of fact and conclusions of law are subject to *de novo* review by the district court. 28 U.S.C. § 157(c)(1). The determination whether a matter is core or non-core may dictate in what forum, an article III court or an article I court, a particular dispute will be heard and resolved. Not only

does that determination have a substantial effect on a multitude of transactions in the public and private arenas, it also implicates issues of constitutional proportions with respect to the proper authority of the diverse courts in which controversies are adjudicated.

Decisional law in circuits other than the Second Circuit recognizes that the analysis of whether a proceeding is core ought not to turn arbitrarily on the distinction between a pre-petition and post-petition matter. *See* discussion, *infra,* of Fifth and Ninth Circuits' decisions. Indeed, the Court in *Marathon* established the dichotomy between the two essentially distinct types of claims related to and arising exclusively under bankruptcy proceedings, to wit, private

rights versus rights core to the federal bankruptcy power.

In the wake of the Court's decisions in *Marathon* and *Granfinanciera S.A. v. Nordberg*, ____ U.S. ____, 109 S. Ct. 2782 (1989), and Congress's enactment of the BAFJA, there is much confusion in the lower courts over the proper scope of the bankruptcy court's jurisdiction. Specifically, the lower courts have rendered conflicting decisions concerning what matters are non-core in light of 28 U.S.C. 157(b)(2) and its non-exhaustive list of enumerated core matters. Although section 157 provides a list of specific matters which are core, the courts have not been able to distinguish with consistency between unenumerated core matters and those matters which are non-core.

In *Marathon* the Court described the distinction between core and non-core matters:

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.

Marathon, 458 U.S. at 72. Clearly, the distinction between core and non-core was derived from the specific underlying rights involved.

In response to the Court's pronouncement proscribing the authority of an article I bankruptcy judge to rule upon what are essentially state law claims, Congress amended the Federal Judgeship Act to draw a distinction between core and non-core matters. 28 U.S.C. § 157(b)(2). The very purpose of the BAFJA was to set, in light of

Marathon, the appropriate limits of the bankruptcy court's authority to hear and resolve disputes. Congress described core matters as those matters which directly relate to the restructuring of the debtor-creditor relationship. What Congress failed to do was give any clear indication of what would constitute "non-core" matters. A careful reading of *Marathon*, however, mandates that a distinction be made between the "adjudication of state-created private rights" and matters at the "core of the federal bankruptcy power." The proper conclusion to be drawn is that adjudication of ordinary state-law contract claims involves private rights between individuals and is not, as a matter of course, core to bankruptcy proceedings.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568

(1985), the Court considered Congress's ability to vest decision-making authority in the Environmental Protection Agency, an administrative agency created pursuant to article I. The Court relied upon its decision in *Marathon* and pointed to the public rights/private rights dichotomy, emphasizing the distinction between claims arising from statutorily created rights and those claims between individuals arising under state law. The Court's decision in *Thomas* reiterates the proposition that disputes between individuals that arise wholly independently of any congressionally created statutes must be subject to an article III court's adjudication; plenary power to review such matters cannot be delegated to an article I court.

Certainly the spirit of the *Marathon* decision was not that a pre-petition/

post-petition bright line would suffice as the demarcation between core and non-core matters. Yet, the Second Circuit below appears to have adopted just such a test; it used the date of the debtor's bankruptcy petition filing as the line of demarcation. According to the Second Circuit, contracts entered into post-petition are core.

The decision below, therefore, ignores the Court's statement in *Marathon,* as well as section 157(b)(2), concerning the important distinction to be made between core and non-core proceedings. The Second Circuit did not consider the nature of the underlying dispute -- ordinary state law contract claims -- and concluded that any individual who enters into a contract with a debtor-in-possession automatically submits to the jurisdiction of the

bankruptcy court to adjudicate all disputes. Yet, the Second Circuit would have the very same parties who entered into an identical contract *prior* to the debtor's bankruptcy filing resolve any disputes arising from that contract in the article III courts as ordinary state law contract claims.

The impetus for the Second Circuit's pre-petition/post-petition distinction was a First Circuit case, *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165 (1st Cir. 1987). In that matter, the First Circuit recognized that post-petition claims are traditionally core matters. The dispute was over the liquidation of bankruptcy estate assets, an enumerated core matter. The Second Circuit's ruling in the case at bar, however, did not focus

on the significance of that element in *Arnold Print Works*; under § 157(b)(2)(O), matters involving liquidation of bankruptcy estate assets are core. Clearly the case at bar does not involve any enumerated core matter under section 157(b)(2). Moreover, it is the First Circuit's *dicta* in *Arnold Print Works* that form the basis of the Second Circuit ruling that the subject insurance dispute is core. The logical extension of the ruling is an all-inclusive core category -- encompassing virtually all post-petition contracts -- which effectively nullifies Congress's attempt to resolve the problems highlighted by *Marathon*.

The Ninth Circuit has adopted a divergent view of the proper scope of the bankruptcy court's authority. In *Piombo Corp. v. Castlerock Properties, Inc. (In*

re Castlerock Properties), 781 F.2d 159 (9th Cir. 1986), the court interpreted section 157 narrowly. Citing *Marathon* and *Thomas* the court held that:

> state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, Sections § [sic] 157(b)(2)(A) and (O).

Castlerock Properties, 781 F.2d at 162.

The Court of Appeals for the Fifth Circuit is in accord with the Ninth Circuit's approach in *Castlerock Properties*, as well as the views expressed by the bankruptcy court in *Acolyte Electric Corp. v. City of New York*, 69 Bankr. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, 1987 WL 47763 (E.D.N.Y. 1987) (Hon. Jack B. Weinstein), *see* discussion, *infra*. In *Wood v. Wood (In*

re Wood), 825 F.2d 90 (5th Cir. 1987), the Fifth Circuit defined the test for determining what are core matters as follows:

> We hold, therefore, that a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. . . . [The controversy here] is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court.

Id., 825 F.2d at 97.

The court of appeals in *Wood* concluded that an action brought against a debtor and a third party for wrongful appropriation of corporate assets that occurred prior to the Chapter 11 bankruptcy filing was not core. In its analysis of the Court's intentions in *Marathon* and the meaning of section 157(b)(2) as applied to the cause of

action at issue in *Wood*, the Fifth Circuit examined the question as follows:

> If the proceeding does not invoke a substantive right created by the Federal Bankruptcy Law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under Section 157(c)(1) it is an "otherwise related" or non-core proceeding.

Id. (emphasis in original).

The Fifth Circuit follows a test that is true to the Court's holding in *Marathon*. It is the nature of the dispute and not its effect on the reorganization that should be determinative. *Wood*, 825 F.2d at 97. This test has also been applied by the United States Bankruptcy Court for the Eastern District of New York in *Acolyte Electric*, 69 Bankr. at 175. The Second Circuit, however, did not accept the reasoning of the Honorable Marvin

Holland, U.S.B.J., in the comprehensive opinion in *Acolyte*. Judge Holland determined that the adversary proceeding in that case was not a core proceeding because "resolution of th[e] action involve[d] a state law determination of the defendant's liability under the contract . . ." *Id.* at 172. Since the claim had an existence "independent of the bankruptcy environment" it could not be placed among the "core" proceeding categories enumerated under 28 U.S.C. § 157(b)(2). *Id.* at 173.

The Third Circuit also considered the question of what is core and what is non-core under section 157(b)(2). In *Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (In re Meyertech Corp.)*, 831 F.2d 410 (3d Cir. 1987), a creditor of the bankruptcy estate filed a proof of claim for money owed on a pre-petition

contract. In its analysis the court noted:

> It is difficult to perceive of a proceeding which would not fall under the all-encompassing language of either § 157(b)(2)(A) or 157(b)(2)(O), [footnote omitted], but we are cautioned that an expansive interpretation of these provisions may lead to some seemingly incorrect and overbroad results regarding core proceedings.

Meyertech, 831 F.2d at 416 (citation omitted). The court also observed that no clear consensus existed among the decisions from the Pennsylvania bankruptcy courts that had wrestled with core/non-core distinction. *Id. at* 417. Ultimately, the Third Circuit decided that the voluntary act of filing a proof of claim itself subjected the creditor to the full jurisdiction of the bankruptcy court; it was a core matter. Indeed the Court's recent *per curiam* decision in *Langenkamp v. Culp,* ____ *U.S.* ____, 111

S. Ct. 330 (1990) *reh'g denied,* 111 S. Ct. 721 (1990), made quite clear the proposition, set forth some time ago in *Katchen v. Landy,* 382 U.S. 323 (1966), that by filing a proof of claim one is deemed to consent to the bankruptcy court's "equitable power." Accordingly, "there is no Seventh Amendment right to a jury trial." 111 S. Ct. at 331. Petitioners have not filed proofs of claim in this matter.

In *Marathon,* Justice White's dissent noted that "the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy," that is, pre-petition. *Marathon,* 458 U.S. at 96. Since such claims are core, the Second Circuit's conclusion that disputes arising from post-petition contracts are necessarily core, virtually eliminates the non-core category.

Chapter 11 reorganization exists to protect the debtor from its creditors and to rehabilitate by, among other things, encouraging others to do business with the debtor undergoing reorganization. It is therefore consistent with the statutory scheme of section 157 that pre-petition matters be subject to adjudication in the bankruptcy court as core proceedings. Similarly, the purpose of the statute is furthered if various post-petition controversies be adjudicated in article III courts as non-core matters. Third parties will transact business with debtors in rehabilitation more freely if they do not face the prospect that ensuing disputes will be heard and resolved in the article I bankruptcy courts. Trial before an article III judge is a valuable right which should not be compromised.

It is evident that there is anything but agreement among the circuits as to the proper interpretation of the BAFJA on the question of whether a dispute is core or non-core under 28 U.S.C. §§ 157(b) and 158(a). The divergent rulings are the direct result of the statutory ambiguity in the provisions which are intended to delineate the scope of the bankruptcy court's power to hear and resolve disputes. Confusion among the circuits runs counter to the purpose of uniform federal bankruptcy laws.

II. THE SECOND CIRCUIT'S REMAND OF THIS CASE FOR A JURY TRIAL IN THE BANKRUPTCY COURT VIOLATES ARTICLE III AND THE SEVENTH AMENDMENT OF THE CONSTITUTION

In *Granfinanciera v. Nordberg*, ____ *U.S.* ____, 109 S. Ct. 2782 (1989), the Court found that fraudulent transfer claims were triable to a jury.

Accordingly, the Court held that the bench trial which had been conducted in the bankruptcy court deprived petitioner of its seventh amendment right. The Court declined, however, to resolve a closely related question that had been highlighted by the findings in *Marathon* and the consequent BAFJA.

> We do not decide today whether the current jury trial provision -- 28 U.S.C. § 1411 (1982 ed., Supp. IV) -- permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.

Granfinanciera, _____ U.S. at _____, 109 S. Ct. at 2802 (footnote omitted). While the facts presented in *Granfinanciera* did

not necessitate resolution of all the significant constitutional issues, that is not the case here. The Second Circuit's decision in this case invites a pronouncement from the Court as to whether a bankruptcy court is empowered to conduct a jury trial.

Notwithstanding that *Granfinanciera* involved an alleged fraudulent conveyance, an enumerated core matter, the right to a jury trial was preserved:

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, ____ U.S. at ____, 109 S. Ct. at 2800.

The Second Circuit placed significant reliance on *Granfinanciera* in reaching its conclusion that the Petitioners are entitled to a jury trial in

the case at bar. The court then turned to the issue of whether that jury trial could be conducted in the bankruptcy court without running afoul of the BAFJA or the Constitution. The lack of guidance in the language of 28 U.S.C. § 1411 was expressly noted, as was the absence of any procedural provision in the Bankruptcy Rules. Nonetheless, the court concluded that because the matter was core, constitutional proscriptions with respect to *de novo* review did not bar tne conduct of a jury trial in the bankruptcy court. Although the court below acknowledged that jury trials in core matters in the bankruptcy court might well be at odds with the seventh amendment, it reasoned that the district court's power to review final orders of the bankruptcy court in core proceedings was analogous to the circuit court's

power to review district court orders. Thus, according to the Second Circuit, constitutional considerations were satisfied.

Following *Granfinanciera,* the courts have struggled to reconcile the prescribed jurisdiction and authority of the bankruptcy courts with the seventh amendment right to trial by jury. For example, in *Perino v. Cohen (In re Cohen),* 107 Bankr. 453 (S.D.N.Y. 1989), the Honorable Charles L. Brieant, U.S.D.J., held that, for judicial efficiency, the bankruptcy court "should" conduct the jury trial of a claim that was legal in nature. *Id.* at 455. Judge Brieant did comment on the constitutional ramifications of a bankruptcy court's conducting a jury trial:

> The Seventh Amendment provisions, and cases decided thereunder, limiting the power of any federal court to modify

> or disregard a jury verdict, because the Constitution is paramount, will take precedence over any statutory provisions for *de novo* review of factual findings of the Bankruptcy Court.

Id. at 455.

Since the original opinion and judgment of the Second Circuit in the case at bar, two other circuits have had occasion to consider the question whether the conduct of a jury trial in a bankruptcy court would infringe on seventh amendment rights. In both instances, the courts of appeals disagreed with the reasoning and the decision of the Second Circuit. *See In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990) and *In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990).

In circuits where the courts of appeal have not yet had the occasion to

speak, the lower courts' opinions have reflected the pervasive uncertainty on the issue at hand. In *Haden v. Edwards (In re Edwards)*, 104 Bankr. 890 (Bankr. E.D. Tenn. 1989), the court concluded that a bankruptcy court could not conduct a jury trial, expressing the view that after *Granfinanciera*, whether a matter was core was not relevant on the jury issue.

> The controlling issue, for jury trial purposes, now appears to be whether the proceeding is one which sounded in law or in equity at common law.

Edwards, 104 Bankr. at 893, n. 4. Citing the pronouncement in *Carr v. Michigan Real Estate Ins. Trust (In re Michigan Real Estate Ins. Trust)*, 87 Bankr. 447, 460 (Bankr. E.D. Mich. 1988), "that when a party properly requests a jury trial in a non-core proceeding, an insoluble jurisdictional mess occurs in the

bankruptcy court," the *Edwards* court commented that the statement in *Carr* "can now be broadened to include a core proceeding." *Edwards* at 898, n. 10.

In *Friedman v. Gold Advice, Inc. (In re Fort Lauderdale Hotel)*, 103 Bankr. 335 (Bankr. S.D. Fla. 1989), another court was faced with the issue. Citing *Granfinanciera* for its view that the defendant had a right to a jury trial, the court noted that Bankruptcy Rule 9015 which establishes bankruptcy court procedures for jury trials had been repealed. The court went on to cite a Florida district court opinion, *In re I.A. Durbin, Inc.*, 62 Bankr. 139 (S.D. Fla. 1986), as authority for the conclusion that the bankruptcy court did not have power to conduct jury trials.

The cases throughout the nation demonstrate that the courts are in a

quandary when faced with a valid jury demand in the bankruptcy court.[3]

The reported opinions on the issue have been generated in the context of both core and non-core proceedings. Notwithstanding the painstaking analysis that is evident from much of the decisional law that has developed, there is clearly no consensus as to the limits of the bankruptcy court's jurisdiction and power with respect to the conduct of jury trials. Indeed, considerable doubt has been expressed as to the ability of a bankruptcy court to conduct a jury trial.

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[3] *Jackson v. Wessel (In re Jackson)*, 90 Bankr. 126, 135 (Bankr. E.D. Pa. 1988) ("We do have some reservations as to our conclusion that, even in this matter, involving a core proceeding which presents an action at law, we, as a bankruptcy court, may conduct a jury trial.") *See also Leird Church Furniture Mfg. Co. v. Union National Bank of Little Rock (In re Leird Church Furniture Mfg. Co.)*, 61 Bankr. 444, 446 (Bankr. E.D. Ark. 1986); *Wm. S. Newman Brewing Co., Inc. v. Schmidt and Sons, Inc. (In re Wm. S. Newman Brewing Co., Inc.)*, 87 Bankr. 236, 239 n.2 (Bankr. N.D. N.Y. 1988); *Baitinger Electric Co., Inc. v. Daidone Electric of New York, Inc. (In re Baitinger Electric Co.)*, 94 Bankr. 33 (S.D.N.Y. 1988).

These issues are directly presented in the case at bar. Their resolution by the Court would answer critical questions which remain after *Granfinanciera*.

III. THE COURT'S EXERCISE OF JURISDICTION IN THIS CASE IS JUSTIFIED BY THE FAR-REACHING IMPLICATIONS UNDER ARTICLE III AND THE SEVENTH AMENDMENT OF THE CONSTITUTION

In *Marathon*, the Court held that Congress's broad grant of jurisdiction to bankruptcy judges under 28 U.S.C. § 1471 was in violation of article III of the Constitution. Under article I, section 8 of the Constitution, bankruptcy courts could be empowered by Congress to issue final orders in core proceedings. The legislation which was developed in response to *Marathon* attempted, specifically in section 157, to delineate with greater particularity what matters

were at the "core" of the bankruptcy court's jurisdiction.

While the concept underlying the distinction between core and non-core matters is evident, section 157 does not provide any guidance as to what types of matters fall into the non-core category (*see* discussion, Point I). Moreover, what remained unresolved after *Marathon*, and was not addressed in subsequent legislation, was the way in which one would exercise the right to a jury trial in a bankruptcy court proceeding.

In *Granfinanciera*, the Court focused on several related issues but did not reach the question of whether jury trials conducted by bankruptcy judges in the bankruptcy court -- in core or non-core matters -- would infringe on the seventh amendment right or the guarantees under article III. Any law or ruling which

threatens to erode the seventh amendment right to a jury trial is subject to a high level of scrutiny. *Dimick v. Schiedt,* 293 U.S. 474 (1935). Thus it is essential that the Court rule upon the constitutionality of the Second Circuit's order that this case be tried by jury in an article I court.

Where the circuit courts have rendered conflicting decisions on issues of considerable moment, especially on matters that should be treated consistently throughout the United States, certiorari should be granted. *See McElroy v. United States,* 455 U.S. 642, 643 (1982); *Marks v. United States,* 430 U.S. 188 (1977); *City of New York v. Saper,* 336 U.S. 328, 329 (1949) (inconsistent application and administration of Bankruptcy Act warranted grant of certiorari). In this con-

troversy, there can be little doubt as to the constitutional significance of the question which presented. Indeed, in *Granfinanciera,* the Court noted the need to address the jury trial issue. The recent pronouncements by the Eighth and Eleventh Circuits further underscore the uncertainty that exists on the question of whether bankruptcy judges can conduct jury trials.

On June 28, 1990, this Court granted certiorari to review the opinion and judgment of the Court of Appeals for the Second Circuit, initially entered on February 7, 1990. The matter was briefed and scheduled for argument on December 3, 1990, but was then remanded to the court of appeals to address the jurisdiction issue raised by the intervenor. That same court of appeals opinion and judgment are now presented to

the Court, having been reinstated by the Second Circuit after it confirmed its jurisdiction. No decisions rendered since the original grant of certiorari have had any impact on the considerations which warranted review of the subject opinion and judgment. The only developments in this area of the law have continued to highlight the divergent views among the circuits, the Second Circuit now constituting a minority of one among the three circuits that have addressed the issue.

Since the Court originally granted certiorari, some courts have held certain bankruptcy proceedings in abeyance pending the Court's decision. *See, e.g., In re Federated Dep't Stores, Inc. and Allied Stores Corp., et al,* WL Camp 2070 (Bankr. S.D. Ohio Oct. 26, 1990) ("Furthermore, the issue of whether any

of the issues before the Court merit a jury trial will likely be resolved by the Supreme Court during its present term.") Thus questions which were compelling when this Court granted certiorari in the first instance are equally, if not more compelling now.

CONCLUSION

The Court's pronouncements in *Marathon*, Congress's response, and the Court's holding in *Granfinanciera* have raised issues integral to the proper functioning of the bankruptcy system. The case at bar presents the Court with the opportunity to resolve these significant issues. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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ebruary 12, 1991

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 486—August Term 1989

(Submitted January 2, 1991 Decided January 22, 1991)

Docket No. 89-5026

IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP,

Debtors,

BEN COOPER, INC.,

Appellant,

—v.—

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Appellees.

Before:

TIMBERS, CARDAMONE and PRATT,

Circuit Judges.

On remand from the Supreme Court, which entered a judgment, 111 S. Ct. 425 (1990), vacating our previous judgment, 896 F.2d 1394 (1990), and directing us to address the question of appellate jurisdiction.

We hold that we do have jurisdiction. Our previous opinion and judgment are reinstated.

KENNETH W. STARR, Solicitor General, Stuart M. Gerson, Assistant Attorney General, John G. Roberts, Jr., Deputy Solicitor General, Stephen J. Marzen, Assistant to the Solicitor General, William Kanter, Katherine S. Gruenheck and Robert M. Loeb, Attorneys, Department of Justice, Washington, D.C., *filed a brief on behalf of intervenor United States.*

LAWRENCE L. GINSBURG, Charles S. Biener, and Lowenthal, Landau, Fischer & Ziegler, New York, N.Y., *filed a brief on behalf of appellant.*

STUART COTTON, Karen M. Cooke, and Mound, Cotton & Wollan, New York, N.Y., *filed a brief on behalf of appellees.*

PER CURIAM:

On November 13, 1990, the Supreme Court entered a judgment, 111 S. Ct. 425 (1990), vacating our opinion

and judgment entered February 7, 1990, reported at 896 F.2d 1394, on the ground that "the Court of Appeals should address the jurisdictional issue in the first instance . . . ." 111 S. Ct. at 425.

By an order dated November 27, 1990, we directed the parties to file briefs addressed to the jurisdictional issue. The parties filed briefs, as did the Solicitor General on behalf of the United States which had been granted the status of intervenor by the Supreme Court.

All parties to these proceedings, as well as the Solicitor General, ultimately agree that we had jurisdiction to review the district court judgment that was the subject of the instant appeal. We conclude in the exercise of our independent judgment that we had jurisdiction. While the parties and the Solicitor General reach this result by different analyses, we agree with the analysis of the Solicitor General.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on this remand from the Supreme Court.

In April 1988, appellant Ben Cooper, Inc. (Cooper), a manufacturer, filed a voluntary petition for reorganization pursuant to Chapter 11. The reorganization plan entered into required it to obtain insurance for its facilities. Cooper obtained insurance from appellee Insurance Company of the State of Pennsylvania (ICSP) through brokers, appellees Kalvin-Miller International, Inc. (K-M) and Kerwick & Curran, Inc. (K&C). After a fire loss in January 1989, Cooper filed a claim with ICSP. In April 1989, ICSP commenced an action in the state

court, seeking, *inter alia*, to void the insurance policy because of alleged misrepresentations made by Cooper in its policy application.

On May 9, 1989, Cooper obtained from the bankruptcy court (Blackshear, J.) a stay of the state court action and a preliminary injunction requiring ICSP to maintain the policy. Cooper also commenced an adversary proceeding in the bankruptcy court. It sought, *inter alia*, a declaration that ICSP was liable for all losses sustained in the fire. Appellees opposed the bankruptcy court's jurisdiction over the adversary proceeding and moved in the district court for withdrawal of the reference. They also moved to have the state court stay and the preliminary injunction lifted. The district court (Walker, J.) remanded the case to the bankruptcy court for a determination whether the claims in the proceeding were "core" or "non-core."

On June 15, 1989, the bankruptcy court entered an order holding that the proceeding was core and retaining jurisdiction. The district court (Stanton, J.) reversed. By oral decision dated July 11, 1989, the district court held that the adversary proceeding was non-core and that appellees were entitled to a jury trial on at least some of the issues raised; it also withdrew the reference to the bankruptcy court, abstained from exercising its own jurisdiction and lifted the stay of the state court proceedings.

On appeal to our Court, the issues were defined as whether the adversary proceeding was core and whether appellees are entitled to a jury trial. 896 F.2d at 1397. We reversed the district court, holding, *inter alia*, that the proceeding was core.

ICSP and K&C petitioned the Supreme Court for certiorari, which was granted on June 28, 1990. Briefs on the merits were filed by the parties and by the Solicitor General on behalf of the United States. In its brief, the Solicitor General addressed the question of our jurisdiction and concluded that the "judgment of the court of appeals should be affirmed." On November 13, 1990, the Supreme Court remanded the case to us for consideration of the jurisdictional question.

II.

We turn now to the question of our jurisdiction. We agree with the Solicitor General that, had the district court gone no further than to withdraw the reference to the bankruptcy court, that decision would have been interlocutory and not appealable pursuant to either 28 U.S.C. § 158(d) (1988) (providing for appeals of final decisions of district courts that dispose of bankruptcy appeals) or 28 U.S.C. § 1291 (1988) (providing for appeals of final decisions of district courts). *E.g.*, *In re Chateaugay Corp.*, 826 F.2d 1177, 1179 (2 Cir. 1987) (holding that an order granting or denying withdrawal is not an appealable order).

We agree further with the Solicitor General that the interlocutory withdrawal order here merged into the final judgment and thus became reviewable. The district court ultimately abstained from exercising jurisdiction. Since we have found previously and reinstate today our finding that the the adversary proceeding was "core," it follows necessarily that the proceeding was not a candidate for "mandatory abstention" pursuant to 28 U.S.C. § 1334(c)(2), which provides that a district court "shall abstain" from exercising jurisdiction in a case "related

to a case under title 11 but not arising under title 11 or arising in a case under title 11." Section 1334(c)(2) further provides that any abstention decision made under that subsection is "not reviewable by appeal or otherwise." The district court's abstention, however, could only have been pursuant to § 1334(c)(1), which provides that a court *may* abstain "from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11." In view of our finding that the adversary proceeding is "core", § 1334(c)(1) abstention ("permissive abstention") was all that could have been exercised by the district court. Nothing prevents appellate review of such an abstention decision.

III.

Having found that we had jurisdiction to review the district court's judgment, we now reinstate our previous opinion and judgment, 896 F.2d 1394, reversing the district court's judgment.

IV.

To summarize:

We had jurisdiction to hear an appeal from a district court judgment that, *inter alia*, withdrew a reference from a bankruptcy court and at the same time abstained from exercising jurisdiction in a core proceeding. Our previous opinion and judgment, 896 F.2d 1394, are reinstated. Appellant and appellees shall bear their own costs.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of November, one thousand nine hundred and ninety.

Present:

HONORABLE WILLIAM H. TIMBERS,

HONORABLE RICHARD J. CARDAMONE,

HONORABLE GEORGE C. PRATT,

Circuit Judges,

IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP.,

Debtors,

BEN COOPER, INC.,

Appellant,

v.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Appellees.

ORDER ON REMAND FROM SUPREME COURT

This Court on February 7, 1990 entered a judgment and filed an opinion, 896 F.2d 1394, reversing the judgment of the District Court and remanding the case to the District Court for further proceedings.

The Supreme Court on June 28, 1990 granted the petition for certiorari filed by The Insurance Company of the State of Pennsylvania, et al., 110 S.Ct. 3269.

The Solicitor General on September 28, 1990 filed in the Supreme Court a "Motion on Behalf of the United States for Leave to Intervene and Brief for the United States" (SG Br.).

The SG Br. at 50 concludes as follows:

> "The judgment of the court of appeals should be affirmed."

The Supreme Court on November 13, 1990 (59 U.S.L.W. 3362) entered a judgment (attached hereto as Exhibit A) which granted the Solicitor General's motion to intervene, vacated the judgment of our

Court, and remanded the cause to our Court for consideration of the jurisdictional issue raised by the United States. SG Br. at 9-17. (attached hereto as Exhibit B).

Accordingly, it is ORDERED as follows:

(1) The judgment of the Supreme Court dated November 13, 1990 is made the judgment of our Court.

(2) Counsel for the respective parties are requested to file, not later than 30 days from the date of this order, briefs addressed to the jurisdictional issue raised in SG Br. at 9-17.

(3) Copies of this order and the attached exhibits shall be furnished to counsel who argued this case in our Court on December 21, 1989 together with the Solicitor General and the Clerk of the Supreme Court.

Dated at New York, N.Y.
This 27 day of November, 1990

ELAINE B. GOLDSMITH, CLERK
/s/

cc: Charles S. Biener, Esq.
Costantino P. Suriano, Esq.
Victoria A. Stewart, Esq.
Geoffrey W. Heineman, Esq.
Kenneth W. Starr, Solicitor General
Joseph P. Spaniol, Jr., Esq., Clerk,
United States Supreme Court

SUPREME COURT OF THE UNITED STATES

No. 89-1784

Insurance Company of the State of Pennsylvania, et al.,

Petitioners,

v.

Ben Cooper, Inc.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE having been submitted on the briefs of the parties, the joint appendix, the record from the lower court, and the motion to intervene filed by the United States,

ON CONSIDERATION WHEREOF: The motion of the United States filed in this Court on September 28, 1990 and granted by this Court has raised a question concerning the Court of Appeals' jurisdiction over this case and hence a question about our own jurisdiction. Motion of the United

States and Brief of the United States, pages 9 through 17. Because the Court of Appeals should address the jurisdictional issue in the first instance, the judgment of the above court is vacated with partial costs, and the cause is remanded to the United States of Appeals for the Second Circuit for consideration of the jurisdictional issued raised by the United States.

IT IS FURTHER ORDERED at the direction of the Court that the petitioners, Insurance Company of the State of Pennsylvania, et al., recover from Ben Cooper, Inc., one-half of the total costs, Ten Thousand Eight Hundred Twenty-Four Dollars ($10,824.00), for their costs herein expended.

November 13, 1990

Clerk Costs:	$ 300.00
Printing of record:	21,348.00
Total:	$21,648.00

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 486—August Term 1989

(Argued December 21, 1989

Decided February 7, 1990)

Docket No. 89-5026

IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP,

Debtors,

BEN COOPER, INC.,

Appellant,

—v.—

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Appellees.

Before:

TIMBERS, CARDAMONE and PRATT,

Circuit Judges.

Appeal from an order entered July 11, 1989, in the Southern District of New York, Louis L. Stanton, *District Judge*, withdrawing the reference to the bankruptcy court, abstaining from exercising jurisdiction and lifting a stay of proceedings in the New York Supreme Court, New York County.

Reversed and remanded.

CHARLES S. BIENER, New York, N.Y., (Lowenthal, Landau, Fischer & Ziegler, P.C., New York, N.Y., on the brief) *for appellant Ben Cooper, Inc.*

CONSTANTINO P. SURIANO, New York, N.Y., (Stuart Cotton, Karen M. Cooke, and Mound, Cotton & Wollan, New York, N.Y., on the brief) *for appellee Insurance Company of the State of Pennsylvania.*

VICTORIA A. STEWART, New York, N.Y., (Jackson & Nash, New York, N.Y., on the brief) *for appellee Kalvin-Miller International, Inc.*

GEOFFREY W. HEINEMAN, New York, N.Y., (Ohrenstein & Brown, New York, N.Y., on the brief) *for appellee Kerwick & Curran, Inc.*

TIMBERS, *Circuit Judge*:

Appellant Ben Cooper, Inc. ("Cooper") appeals from an oral decision from the bench on July 11, 1989, in the Southern District of New York, Louis L. Stanton, *District Judge*. The district court reversed an order of the bankruptcy court, Cornelius Blackshear, *Bankruptcy Judge*, filed on June 15, 1989. The bankruptcy court held that the adversary proceeding filed by Cooper against appellees Insurance Company of the State of Pennsylvania ("ICSP"), Kalvin-Miller International, Inc. ("KM") and Kerwick & Curran, Inc. ("K & C") was "core" within the meaning of 28 U.S.C. § 157(b)(2) (1988). It retained jurisdiction. The district court disagreed, holding that the adversary proceeding was merely "related" to Cooper's underlying Chapter 11 petition, and withdrew the reference to the bankruptcy court. The district court also held that withdrawal was required because appellees were entitled to a jury trial on at least some of their affirmative defenses and on some of Cooper's claims. The district court then abstained from addressing the merits of Cooper's claims in favor of ongoing proceedings based on the same operative facts, commenced by ICSP in New York Supreme Court, New York County. Cooper timely appealed to this Court.

On appeal, Cooper asserts that the proceeding is core and that appellees are not entitled to a jury trial. Appellees, in turn, assert that the proceeding is non-core and that their jury demand should be honored. For the reasons stated below, we hold that the proceeding is core, and therefore we reverse the district court. We also hold that appellees are entitled to a jury trial, and that such

trial should be in the bankruptcy court. We therefore remand the case to the bankruptcy court.

We reach our determination of the issue of core jurisdiction in light of *In re Manville Forest Products Corp.*, No. 89-5019, ____ F. 2d ____ (2 Cir. 1990), also decided today, and assume familiarity with that opinion.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Cooper is a toy and costume manufacturer and importer. Facing economic difficulties, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in April 1988. Pursuant to that petition, Cooper submitted a reorganization plan under which, among other things, it covenanted to "keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards."

Acting to fulfill its responsibility under the plan (which was finally confirmed by the bankruptcy court on April 4, 1989), Cooper retained KM, an insurance broker, to obtain coverage for its various facilities. KM enlisted K & C, another broker, to assist in finding coverage for Cooper. In October 1988 the brokers procured from ICSP a standard commercial property insurance policy for one of Cooper's facilities, located in Georgia. Appellees do not dispute that they were aware of Cooper's Chapter 11 status.

On January 6, 1989, the Georgia facility was hit by fire, resulting in damage that, Cooper claimed, totaled

over $2 million. After an extended investigation, ICSP determined that it was not liable for the loss because of alleged misrepresentations and omissions by Cooper in the policy application; specifically, that Cooper failed to disclose in its application that the facility was used for manufacturing rather than as a warehouse. Moreover, ICSP determined that Cooper exaggerated its loss in the fire when it submitted its claim. That dispute underlies the instant appeal but is not before us directly. We express no view as to its proper disposition.

On April 18, 1989, ICSP formally cancelled its policy with Cooper. That same day, ICSP commenced an action in the New York Supreme Court, New York County. Its complaint alleged three causes of action: (1) that the policy was void *ab initio* due to the misrepresentations in Cooper's application; (2) that it was not liable for the fire loss because of those misrepresentations; and (3) that it was not liable under the policy because of Cooper's exaggerated claim of loss. Cooper sought and, on May 9, received from the bankruptcy court a stay of the state court action and a preliminary injunction requiring ICSP to maintain the policy.

Almost simultaneously, Cooper commenced, in the bankruptcy court, the adversary proceeding that is the subject of the instant appeal. Cooper's complaint contained three counts. The first, against ICSP, requested a declaration that the policy remained in effect, a declaration that ICSP was liable for all losses sustained in the fire, and punitive damages from ICSP of $5 million. The second count, against KM, alleged negligent conduct in obtaining the policy, and requested, if ICSP were found not liable under the policy, that KM be held responsible for the fire and consequential losses. The

third count, against K & C, essentially mirrored the second. ICSP's answer set forth five affirmative defenses. Three of them repeated, almost to the word, the three causes of action in ICSP's state court complaint.

Appellees opposed the bankruptcy court's jurisdiction over the adversary proceeding, and moved the district court for withdrawal of the reference. They also moved to have the state court stay and the preliminary injunction lifted. Rather than rule on the merits of the motion, the district court, Hon. John M. Walker, remanded the case to the bankruptcy court on May 31 for a determination of the question whether the claims in the proceeding were core.

On June 15 the bankruptcy court entered an order holding that the proceeding was core, and retained jurisdiction. It relied primarily on § 157(b)(2)(A) (estate administration) and secondarily on § 157(b)(2)(L) (confirmation of plans).

Appellees then moved in the district court to reverse that order. The court did so in an oral ruling dated July 11, holding that, while the statutory provisions were relevant to the adversary proceeding, the statutory provisions were not sufficiently broad to render the proceeding core. Moreover, the court held that appellees were entitled to a jury trial on at least some of the issues raised. The court also granted the ancillary relief appellees sought: withdrawal of the reference to the bankruptcy court, abstaining from exercising its own jurisdiction, and lifting the stay of the state court proceedings. This appeal followed.

On appeal, the parties agree that the primary issues are (1) whether the adversary proceeding is core, and

(2) whether appellees are entitled to a jury trial, as they have demanded. Cooper does not raise the other issues on which the district court ruled—the decisions to lift the state court stay and to abstain from exercising jurisdiction.

II.

We turn first to the question whether the adversary proceeding is core within the meaning of 28 U.S.C. § 157(b)(2) (1988). As a question of law, we review de novo the district court's determination that the proceeding is non-core. *Brunner* v. *New York State Higher Ed. Servs.*, 831 F.2d 395, 396 (2 Cir. 1987).

(A)

The jurisdiction of the bankruptcy court over core proceedings is set forth in 28 U.S.C. § 157(b)(1) (1988), which provides that "[b]ankruptcy judges may hear and determine . . . all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments." By contrast, any determinations by the bankruptcy court in a non-core proceeding, upon timely objection, are subject to de novo review by the district court. 28 U.S.C. § 157(c)(1) (1988).

In § 157(b)(2), Congress provided a non-exclusive list of proceedings which it deemed core. Like the bankruptcy court, our analysis will focus on § 157(b)(2)(A) ("matters concerning the administration of the estate"). The language of that sub-section could be construed to include almost any matter relating to bankruptcy, but the structure of the statute as a whole does not permit such a construction. Matters that merely concern the

administration of the bankrupt estate tangentially are related, non-core proceedings. *In re Wood*, 825 F.2d 90, 96 (5 Cir. 1987) (Wisdom, J.).

Our attempt to make the general language of § 157(b)(2)(A) more concrete begins with the Supreme Court's plurality opinion in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). At issue in *Marathon* was the provision of the Bankruptcy Act of 1978 which gave the bankruptcy court "jurisdiction over all 'civil proceedings arising under . . . or arising in or *related to* cases under title 11.' " *Id.* at 54 (emphasis in original) (quoting 28 U.S.C. § 1471(b) (Supp. IV 1980)). In order to exercise that jurisdiction, the statute vested bankruptcy courts with "all of the 'powers of a court of equity, law, and admiralty,' " with only very limited exceptions. *Id.* at 55 (quoting 28 U.S.C. § 1481 (Supp. IV 1980)). Despite that broad jurisdictional grant, however, the Act did not give bankruptcy judges Article III status.

In *Marathon*, the underlying cause of action, as here, was breach of contract. The cause of action arose before Northern Pipeline, the debtor, petitioned the bankruptcy court for Chapter 11 reorganization. The debtor, however, did not initiate the action until after the Chapter 11 petition was filed. Under the 1978 Act, therefore, the bankruptcy court had full jurisdiction over the dispute.

The Supreme Court held that while Congress, pursuant to its power under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4, could grant the bankruptcy courts the right to issue final orders in proceedings that were at the core of bankruptcy jurisdiction, primarily the restructuring of the debtor-creditor relationship, it could not give the right to issue such

orders in "private right" claims (e.g., tort and contract), merely because those claims involved a debtor. *Marathon*, *supra*, 458 U.S. at 71. Those traditional common law claims, the Court held, were reserved for Article III courts.

The congressional response to *Marathon* is set forth in § 157. We employ the "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), to interpret that response. Neither the House nor the Senate issued a report regarding the Bankruptcy Amendments and Federal Judgeship Act of 1984, of which § 157 is a part. The statements of several influential legislators, however, indicate that bankruptcy jurisdiction was to be construed as broadly as possible within the constitutional constraints of *Marathon*. We agree with the First Circuit's analysis of the legislative history. As that court stated,

> "the legislative history of [§ 157] indicates that Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95 percent of the proceedings brought before bankruptcy judges would be core proceedings. *See* 130 Cong. Rec. E1108-1110 (daily ed. March 20, 1984) (statement of Representative Kastenmeier); *id.* at H1848, H1850 (daily ed. March 21, 1984) (statement of Representative Kindness). They used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as 'Marathon-type' cases, *see, e.g.*, *id.* at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848

> (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of 'a very limited kind,' *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness)."

In re Arnold Print Works, Inc., 815 F.2d 165, 168 (1 Cir. 1987) (Breyer, J.).

Moreover, § 157(b)(3) provides additional support for our conclusion that Congress intended a narrow reading of *Marathon*. That section provides in relevant part that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." We read that as a demonstration of Congress' intent that bankruptcy courts are not precluded from adjudicating state-law claims when such claims are at the heart of the administration of the bankrupt estate.

(B)

With this in mind, our task is to determine whether this adversary proceeding, which arose after Cooper filed its Chapter 11 petition and which is founded on state contract law, falls within "the core of the federal bankruptcy power." *Marathon*, *supra*, 458 U.S. at 71.

Section 301 of the Bankruptcy Code provides:

> "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of

> this title constitutes an order for relief under such chapter."

11 U.S.C. § 301 (1988). The filing of the petition sets in motion several events. Most significant, from the standpoint of the instant appeal, it creates the "estate" for bankruptcy purposes. 11 U.S.C. § 541(a) (1988). The Supreme Court has stated, in construing the direct predecessor to § 541(a), that

> " 'the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' "

Goggin v. *Division of Labor Law Enforcement*, 336 U.S. 118, 125-26 (1949) (quoting *Everett* v. *Judson*, 228 U.S. 474, 479 (1913)); *see also Kohn* v. *Myers*, 266 F.2d 353, 355 (2 Cir. 1959); *Lockhart* v. *Garden City Bank & Trust Co.*, 116 F.2d 658, 661 (2 Cir. 1940). Moreover, in addition to creating estate property, the filing date adjusts "the rights of others connected with the proceeding." King, 4 Collier on Bankruptcy ¶ 541.04, at 541-22 (15th ed. 1989). Logically, a post-petition contract that has as its subject matter an estate asset must be analyzed differently than one arising pre-petition.

The First Circuit, in *Arnold Print Works*, *supra*, recently held that post-petition contract claims are core. *Arnold Print Works* observed that, historically, trustees and debtors-in-possession (Cooper's status) have been viewed for various purposes as officers of the bankruptcy court. 815 F.2d at 169-70. Post-petition contracts

with the debtor-in-possession, therefore, are integral to the estate administration from the date they are entered into. *Id.*; *In re Baker & Getty Financial Servs. Inc.*, 88 B.R. 137, 139-40 (Bankr. N.D. Ohio 1988); *In re Franklin Computer Corp.*, 60 B.R. 795, 800-01 (Bankr. E.D. Pa. 1986). We find the reasoning of *Arnold Print Works* especially persuasive in light of the facts of the instant appeal: the Georgia facility was an asset of the estate; Cooper's reorganization plan promised adequate insurance for the estate assets; the bankruptcy court's confirmation of the plan was premised on adequate insurance; and appellees were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. *Cf. In re Mike Burns Inn, Inc.*, 70 B.R. 863 (Bankr. D. Mass. 1987) (post-petition claim on insurance policy acquired post-petition is core); *In re Heaven Sent, Ltd.*, 50 B.R. 636 (Bankr. E.D. Pa. 1985) (action to maintain insurance is core). It is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration.

We hold, therefore, that the bankruptcy court has core jurisdiction, pursuant to § 157(b)(2)(A), over contract claims under state law when the contract was entered into post-petition. The adjudication of such claims is an essential part of administering the estate. We read *Marathon* to apply to claims arising *pre-petition*, and decline to apply that ruling to claims involving contracts entered into post-petition. Similarly, we distinguish those lower court cases cited by appellees that, relying on *Marathon*, hold pre-petition claims to be non-core. *E.g.*, *In re Pied Piper Casuals, Inc.*, 65 B.R. 780 (S.D.N.Y. 1986); *In re Blue Point Carpet,*

Inc., 86 B.R. 327 (Bankr. E.D.N.Y. 1988); *Acolyte Electric Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, No. 86-0329 (E.D.N.Y. 1987).

We are aware that language from opinions of two other circuits may be read to disagree with our holding. In one, *In re Castlerock Properties*, 781 F.2d 159 (9 Cir. 1986), the contract apparently existed pre-petition. It is therefore unlikely that its holding that the proceeding in question was non-core conflicts with our holding on the instant appeal. In any event, we decline to follow the sweeping statement in *Castlerock* that

> "state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)(-)(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections § [sic] 157(b)(2)(A) and (O)."

Id. at 162. Such a reading of the statute in our view would render the general provisions null.

The Fifth Circuit stated in *In re Wood*, *supra*, 825 F.2d at 97, that "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." The court held that a claim under state law arising from a post-petition dispute did not fit either category. The instant appeal does not fit in the first category. We hold that the timing of a dispute may render it uniquely a bankruptcy case. To the extent that *Wood* conflicts with our holding, we decline to follow it.

III.

Having held that the bankruptcy court has jurisdiction over the adversary proceeding as a core matter, we turn to the question whether appellees are entitled to a jury trial on the factual issues raised, i.e., whether Cooper misrepresented the nature of the facility in its insurance application and whether it exaggerated its loss from the fire.

(A)

In its decision, the district court stated that "[t]he defendants are entitled to a jury trial with respect to at least some of the debtor's claims and their affirmative defenses." That ruling made no reference to *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782 (1989), decided only two weeks earlier. Since that case weighs heavily on the instant appeal, we address it in depth.

In *Granfinanciera*, the respondent, a Chapter 11 trustee, sued the petitioners in the bankruptcy court to recover fraudulent transfers allegedly made by the bankrupt corporation. Section 157(b)(2)(H) explicitly provides that actions to recover fraudulent conveyances are core proceedings. The bankruptcy court therefore held that it could hear the action without a jury, despite the petitioners' demand for a jury trial. The district court and the court of appeals both affirmed. The Supreme Court, however, in a somewhat opaque opinion, reversed.

One aspect of the Supreme Court opinion is clear—that is, when a party makes a jury demand for a claim that is inherently legal, "Congress cannot eliminate [that] party's Seventh Amendment right to a jury trial

merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 2800. In other words, we are required to analyze the underlying nature of the claim without regard to Congress' designation of that claim as core.

The aspect of *Granfinanciera* that we find difficult to decipher is its expression of the Court's view whether the bankruptcy court can hold jury trials in proceedings that are both legal and, at the same time, core pursuant to § 157(b). To be sure, the Court explicitly left that question open. *Id.* at 2802. But in its discussion of the questions it did address, there are several passages that can be construed as affecting the determination of that question.

One such passage is the discussion of the "public rights-private rights" dichotomy. To review, *Marathon* appeared to hold that Article I courts could adjudicate claims at the core of bankruptcy because such claims were public rights, and central to Congress' constitutional bankruptcy power. *Marathon*, *supra*, 458 U.S. at 71; *see also In re Kaiser*, 722 F.2d 1574, 1580 & n.2 (2 Cir. 1983). We say "appeared" only because *Granfinanciera* equivocated on that statement. 109 S. Ct. at 2797-98 & n.11. *Granfinanciera*, in turn, premised its holding that a fraudulent conveyance action carries a Seventh Amendment right to a jury trial, at least in part, on its conclusion that such action is a private right. *Id.* at 2795-98. If, therefore, the Supreme Court held that all adversary proceedings sounding in law are private rights of action, a determination that the instant action is legal would compel us to hold that the proceeding is not core.

Fortunately, we need not read *Granfinanciera* so broadly. That opinion also contains several passages indicating the Court's contemplation that its holding may result in jury trials in the bankruptcy court. For example, the Court stated that

> "one cannot easily say that 'the jury would be incompatible' with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. And Justice White's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life tenure overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions."

Id. at 2801 (citations omitted). As this passage indicates, Justice White's dissenting opinion understood the majority as leaving the door open for jury trials in bankruptcy and criticized the majority for doing so. *Id.* at 2810-12 (White, J., dissenting).

In view of the foregoing, we find that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court. We therefore will analyze the question anew; addressing first whether the claims on the instant appeal are inherently legal, and second whether any statutory or constitutional provision bars the bankruptcy court from conducting jury trials.

(B)

In any action commenced in a federal court, "the right to a jury trial . . . is to be determined as a matter of federal law." *Simler* v. *Conner*, 372 U.S. 221, 222 (1963) (per curiam). Before we analyze the federal law applicable to the issues raised on the instant appeal, we will review briefly the relevant facts. The parties do not dispute that, due to the fire, ICSP's alleged obligation under the policy has matured. ICSP believes that Cooper defrauded it, and accordingly has sued in the state court to have the policy rescinded and to have its obligations declared void. Cooper then sued in the bankruptcy court for a declaration that the policy was still valid and that ICSP is liable for the damages Cooper claims. Alternatively, Cooper claims that if the policy is declared void, the fault lies with KM and K & C, rendering them liable for Cooper's losses.

We reject Cooper's contention that, merely because ICSP arguably is seeking rescission, the nature of the action is equitable. We agree with Professor Moore, who states that when

> "the insurer's liability under the policy has matured, the basic issues are legal. This is true whether the insurer sues to cancel the policy and the beneficiary counterclaims for recovery on the policy, or the beneficiary sues for recovery on the policy and the insurer defends and/or counterclaims for cancellation on the ground of fraud."

5 Moore's Federal Practice ¶ 38.23, at 38-200-01 (2d ed. 1988) (footnotes omitted); *see also American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 212 (1937); *Woods* v. *National Life and Accident Ins. Co.*, 347 F.2d 760, 767

(3 Cir. 1965); *Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F.2d 62, 65 (3 Cir.), *cert. denied*, 320 U.S. 777 (1943).

That the claim may be construed as a request for a declaratory judgment does not change matters. It is settled law that in a declaratory action, "the nature of the underlying dispute determines whether a jury trial is available." *In re Petition of Rosenman & Colin*, 850 F.2d 57, 60 (2 Cir. 1988).

The argument of KM and K & C in favor of a jury trial is even more compelling. Cooper seeks damages from them for alleged negligence and malpractice. It is difficult to imagine a claim that is more inherently legal. Cooper makes little attempt to assert the contrary. The conclusion that "in an ordinary tort action . . . the right of trial by jury is guaranteed by the Constitution," *United States* v. *Fotopulos*, 180 F.2d 631, 634 (9 Cir. 1950), is so obvious that it hardly needs belaboring.

(C)

Since appellees have a right to a jury trial in this core proceeding, this brings us to the issue whether the bankruptcy court has statutory and constitutional authority to conduct such trials.

The relevant statutory provision, 28 U.S.C. § 1411 (1988), offers almost no guidance. The part of the statute applicable to voluntary petitions provides only that "this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." *Id.* at § 1411(a). This provision does not even make clear whether jury trials are

afforded for other actions, let alone the proper forum for those trials. Of course, *Granfinanciera* has clarified the former issue, holding that jury trials are to be afforded for all legal actions.

Despite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings. This is the position taken by the majority of courts which have considered the issue. Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1027-34 (1988) (citing cases). The cases in support of this view are too numerous to cite; we mention only a few of the more comprehensive ones. *Dailey* v. *First Peoples Bank of N.J.*, 76 B.R. 963 (D.N.J. 1987); *In re McCormick*, 67 B.R. 838 (D. Nev. 1986); *In re Kroh*, 1989 WL 153045 (Bankr. W.D. Mo., Dec. 18, 1989); *In re Data Compass Corp.*, 92 B.R. 575 (Bankr. E.D.N.Y. 1988).

Our holding rests on two separate but related provisions. The first provision is 28 U.S.C. § 151 (1988), which states that "[e]ach bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit or proceeding." The second provision is § 157(b), which, as stated previously, gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. *Granfinanciera* teaches that such proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders. Construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns.

At present, there is no specific procedure in the Bankruptcy Rules providing for jury trials. For several years Rule 9015 prescribed a procedure for trials, but that rule was withdrawn in 1987 because bankruptcy courts were relying on it for substantive support for their right to conduct the trials. The Committee noted that " '[i]n the event the courts of appeals or the Supreme Court define a right to jury trial in any bankruptcy mattes [sic], a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules.' " Gibson, *supra*, 72 Minn. L. Rev. at 1030 n.296 (quoting Committee Note to Abrogation of Bankr. R. 9015). In the interim, many courts have relied on local rules or Rule 38, the analogous Federal Rule of Civil Procedure. *E.g.*, *In re Kroh*, *supra*; *In re 222 Liberty Assocs.*, 99 B.R. 639, 643 (Bankr. E.D. Pa. 1989); *In re W.G.M.C., Inc.*, 96 B.R. 5, 6 (Bankr. D. Me. 1989); *In re Jackson*, 90 B.R. 126, 133 (Bankr. E.D. Pa. 1988).

(D)

The first possible constitutional hurdle to jury trials in the bankruptcy court is the Seventh Amendment, specifically the requirement that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. No reviewing court therefore may "redetermine facts found by the jury." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). Thus, the Seventh Amendment may well render unconstitutional jury trials in non-consensual non-core proceedings, because of the requirement that findings of fact by the bankruptcy court be reviewed de novo by the district court. 28 U.S.C. § 157(c)(1). Dis-